

## Quick Reference to the Companies Act, 71 of 2008

### INDEX

<b>1.</b>	<b>OVERVIEW</b>  1.1. MEMORANDUM OF INCORPORATION: TO REPLACE CURRENT MEMORANDUM AND ARTICLES OF ASSOCIATION 1.2. CATEGORIES OF COMPANIES 1.3. THE FUTURE OF CLOSED CORPORATIONS 1.4. COMPANIES WITHOUT NAMES 1.5. REQUIREMENT FOR AUDIT 1.6. ANNUAL RETURN 1.7. APPROVAL OF TRANSACTIONS 1.8. PROTECTION OF WHISTLEBLOWERS 1.9. COMPANIES TRIBUNAL 1.10. ULTRA VIRES ACTS: NO LONGER RELEVANT 1.11. "WIDELY HELD" AND "CLOSELY HELD" DEFINITIONS: CORPORATE LAWS AMENDMENT ACT 1.12. RELATED AND INTER-RELATED PERSONS AND CONTROL 1.13. SUBSIDIARY RELATIONSHIP 1.14. SOLVENCY AND LIQUIDITY 1.15. DIRECTORS' DUTIES
<b>2.</b>	<b>NOTICES: REFERENCE TO BUSINESS DAYS</b>
<b>3.</b>	<b>STATE OWNED COMPANIES (Definitions)</b>
<b>4.</b>	<b>NOTICES: ELECTRONIC TRANSMISSION ACCEPTED</b>
<b>5.</b>	<b>NAME RESERVATION</b>
<b>6.</b>	<b>INCORPORATION OF COMPANIES</b>
<b>7.</b>	<b>NON PROFIT COMPANIES [SECTION 16(3)] MAY HAVE NO VOTING MEMBERS: PROCEDURE TO AMEND MEMORANDUM OF INCORPORATION</b>
<b>8.</b>	<b>COMPANY RECORDS</b>
<b>9.</b>	<b>FINANCIAL STATEMENTS</b>
<b>10.</b>	<b>QUORUM FOR ALL SHAREHOLDER MEETINGS</b>
<b>11.</b>	<b>SIMPLIFICATION OF DECISION MAKING: ONE-MAN COMPANY</b>
<b>12.</b>	<b>PROXIES</b>
<b>13.</b>	<b>ROUND ROBIN RESOLUTIONS OF SHAREHOLDERS</b>
<b>14.</b>	<b>REQUISITIONS FOR A SHAREHOLDER MEETING</b>
<b>15.</b>	<b>ANNUAL GENERAL MEETINGS</b>
<b>16.</b>	<b>NOTICES OF GENERAL MEETING</b>
<b>17.</b>	<b>SUMMARISED FINANCIAL STATEMENTS</b>
<b>18.</b>	<b>ELECTRONIC COMMUNICATION: SHAREHOLDERS' MEETINGS</b>
<b>19.</b>	<b>SHAREHOLDERS' MEETINGS: QUORUM AND ADJOURNMENT</b>

20.	THE NEED FOR SPECIAL RESOLUTIONS
21.	BOARD DIRECTORS AND PRESCRIBED OFFICERS
22.	REMOVAL OF DIRECTORS
23.	BOARD COMMITTEES
24.	COMPANIES WITH ONE DIRECTOR
25.	BOARD MEETINGS
26.	ROUND ROBIN RESOLUTIONS: DIRECTOR ACTING OTHER THAN AT A MEETING
27.	DIRECTOR'S PERSONAL FINANCIAL INTEREST
28.	STANDARDS OF DIRECTOR'S CONDUCT
29.	LIABILITY OF DIRECTORS AND PRESCRIBED OFFICERS
30.	INDEMNIFICATION AND DIRECTORS' INSURANCE
31.	WINDING-UP OF SOLVENT COMPANIES AND DEREGISTERING OF COMPANIES
32.	APPOINTMENT OF COMPANY SECRETARY
33.	APPOINTMENT OF AUDITOR
34.	APPOINTMENT OF AUDIT COMMITTEE
35.	AUDITOR
36.	AUDIT COMMITTEES
37.	PUBLIC OFFERINGS OF COMPANY SECURITIES
38.	FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS
39.	BUSINESS RESCUE AND COMPROMISE WITH CREDITORS
40.	REMEDIES AND ENFORCEMENT: ALTERNATIVE PROCEDURES FOR ADDRESSING COMPLAINTS OR SECURING RIGHTS
41.	DISPUTES: COMPANY NAMES
42.	PROTECTION OF SECURITIES HOLDER
43.	DECLARING A DIRECTOR TO BE DELINQUENT OR UNDER PROBATION
44.	RELIEF FROM OPPRESSIVE OR PREJUDICIAL CONDUCT
45.	DISSENTING SHAREHOLDERS: APPRAISAL RIGHTS
46.	DERIVATIVE ACT
47.	COMPLAINTS TO THE TAKEOVER REGULATION PANEL OR THE COMMISSION
48.	COMPLIANCE NOTICES
49.	ADMINISTRATIVE FINES
50.	SUMMONSES AND PROCEDURE FOR "ENTER AND SEARCH"
51.	PROCEDURES FOR ADJUDICATION BY COMPANIES TRIBUNAL
52.	ESTABLISHMENT OF COMPANIES AND INTELLECTUAL PROPERTY COMMISSION
53.	THE COMPANIES TRIBUNAL
54.	TAKEOVER REGULATION PANEL
55.	ESTABLISHMENT OF FINANCIAL REPORTING STANDARDS COUNCIL
56.	OTHER PROVISIONS
57.	REGULATIONS
58.	SCHEDULES

## ALPHABETICAL INDEX

	POINT NUMBER
ADMINISTRATIVE FINES	49
ANNUAL GENERAL MEETINGS	15
APPOINTMENT OF AUDIT COMMITTEE	34
APPOINTMENT OF AUDITOR	33
APPOINTMENT OF COMPANY SECRETARY	32
AUDIT COMMITTEES	36
AUDITOR	35
BOARD COMMITTEES	23
BOARD DIRECTORS AND PRESCRIBED OFFICERS	21
BOARD MEETINGS	25
BUSINESS RESCUE AND COMPROMISE WITH CREDITORS	39
COMPANIES WITH ONE DIRECTOR	24
COMPANY RECORDS	8
COMPLAINTS TO THE TAKEOVER REGULATION PANEL OR THE COMMISSION	47
COMPLIANCE NOTICES	48
DECLARING A DIRECTOR TO BE DELINQUENT OR UNDER PROBATION	43
DERIVATIVE ACT	46
DIRECTOR'S PERSONAL FINANCIAL INTEREST	27
DISPUTES: COMPANY NAMES	41
DISSENTING SHAREHOLDERS: APPRAISAL RIGHTS	45
ELECTRONIC COMMUNICATION: SHAREHOLDERS' MEETINGS	18
ESTABLISHMENT OF COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	52
ESTABLISHMENT OF FINANCIAL REPORTING STANDARDS COUNCIL	55
FINANCIAL STATEMENTS	9
FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS	38
INCORPORATION OF COMPANIES	6
INDEMNIFICATION AND DIRECTORS' INSURANCE	30
LIABILITY OF DIRECTORS AND PRESCRIBED OFFICERS	29
NAME RESERVATION	5
NON PROFIT COMPANIES [SECTION 16(3)] MAY HAVE NO VOTING MEMBERS: PROCEDURE TO AMEND MEMORANDUM OF INCORPORATION	7
NOTICES OF GENERAL MEETING	16
NOTICES: ELECTRONIC TRANSMISSION ACCEPTED	4
NOTICES: REFERENCE TO BUSINESS DAYS	2
OTHER PROVISIONS	56
OVERVIEW	1
PROCEDURES FOR ADJUDICATION BY COMPANIES TRIBUNAL	51
PROTECTION OF SECURITIES HOLDER	42
PROXIES	12
PUBLIC OFFERINGS OF COMPANY SECURITIES	37
QUORUM FOR ALL SHAREHOLDER MEETINGS	10
RELIEF FROM OPPRESSIVE OR PREJUDICIAL CONDUCT	44
REMEDIES AND ENFORCEMENT: ALTERNATIVE PROCEDURES FOR ADDRESSING COMPLAINTS OR SECURING RIGHTS	40
REMOVAL OF DIRECTORS	22
REQUISITIONS FOR A SHAREHOLDER MEETING	14
ROUND ROBIN RESOLUTIONS OF SHAREHOLDERS	13
ROUND ROBIN RESOLUTIONS: DIRECTOR ACTING OTHER THAN AT A MEETING	26
REGULATIONS	57
SCHEDULES	58

<b>SHAREHOLDERS' MEETINGS: QUORUM AND ADJOURNMENT</b>	<b>19</b>
<b>SIMPLIFICATION OF DECISION MAKING: ONE-MAN COMPANY</b>	<b>11</b>
<b>STANDARDS OF DIRECTORS' CONDUCT</b>	<b>28</b>
<b>STATE OWNED COMPANIES (Definitions)</b>	<b>3</b>
<b>SUMMARISED FINANCIAL STATEMENTS</b>	<b>17</b>
<b>SUMMONSES AND PROCEDURE FOR "ENTER AND SEARCH"</b>	<b>50</b>
<b>TAKEOVER REGULATION PANEL</b>	<b>54</b>
<b>THE COMPANIES TRIBUNAL</b>	<b>53</b>
<b>THE NEED FOR SPECIAL RESOLUTIONS</b>	<b>20</b>
<b>WINDING-UP OF SOLVENT COMPANIES AND DEREGISTERING OF COMPANIES</b>	<b>31</b>

## 1. OVERVIEW

### 1.1. **MEMORANDUM OF INCORPORATION: TO REPLACE CURRENT MEMORANDUM AND ARTICLES OF ASSOCIATION** (Section 15)

All companies will be required to have a single document entitled "The Memorandum of Incorporation", in place of the current Memorandum and Articles of Association.

### 1.2. **CATEGORIES OF COMPANIES** (Section 8)

The following categories will exist:

#### 1.2.1. **Non-Profit Companies** (Section 10, section 11(3)(c) and Schedule 1)

The name to end with "NPC"

#### 1.2.2. **Profit Companies** [Section 11(3)(c)]

1.2.2.1. Private Companies: To continue to be reflected as Proprietary Limited

1.2.2.2. Personal Liability Companies Section 8(2)(c) : To be reflected as "Incorporated"

1.2.2.3. Public Companies: To be reflected as "Limited"

1.2.2.4. State Owned Company: To be reflected as "S O C Limited"

### 1.3. **THE FUTURE OF CLOSE CORPORATIONS** (Schedule 2)

1.3.1. Close Corporations in existence on the effective date may continue (indefinitely) in that form.

1.3.2. Alternatively Close Corporations may be converted into Companies.

1.3.3. No Close Corporations may be incorporated after the effective date of the Companies Act, 2008.

### 1.4. **COMPANIES WITHOUT NAMES**

It will become possible to form a company that is known only by its registration number.

### 1.5. **REQUIREMENT FOR AUDIT** (Section 30)

1.5.1. The Annual Financial Statements of public companies will continue to require an audit.

1.5.2. Other companies may be either audited voluntarily or require an independent review.

1.5.3. Companies where all shareholders are also directors are exempt from both audit and review.

## 1.6. **ANNUAL RETURN**

- 1.6.1. All companies, including external companies, will be required to lodge an annual return with CIPC (S33)
- 1.6.2. Any company that is required to produce **audited** annual financial statements must lodge these with aforementioned return.

## 1.7. **APPROVAL OF TRANSACTIONS**

A minority of shareholders holding more than 15 per cent may oppose a company transaction.

Provision is made for a buy-out of minorities, who do not consent to the transaction, at an appraised value.

## 1.8. **PROTECTION OF WHISTLEBLOWERS (Chapter 7)**

The Act makes provision for the protection of Whistleblowers.

## 1.9. **COMPANIES TRIBUNAL**

Provision is made for a Companies Tribunal.

## 1.10. **ULTRA VIRES ACTS: NO LONGER RELEVANT**

As is presently the case with Close Corporations, Companies are, in future, to have the contractual powers of a natural person (S19). Consequently, Ultra Vires will be a seldom used principle.

It is, of course, possible for Shareholder Agreements, Board Charters and other documents to restrict the powers of certain directors. This would provide a right for the company to claim damages if the director acts beyond his or her powers.

A special resolution of members may [S20(2)] ratify any action by the company or its directors that is in conflict with limitations contained in the Memorandum of Incorporation.

## 1.11. **“WIDELY HELD” AND “CLOSELY HELD” DEFINITIONS: CORPORATE LAWS AMENDMENT ACT**

The “widely held” and “closely held” differences between companies, which were imposed by the Corporate Laws Amendment Act, will no longer apply.

## 1.12. **RELATED AND INTER-RELATED PERSONS AND CONTROL (Section 2)**

The definition of related parties/persons includes:

- 1.12.1. ~ Married persons
- ~ Those in a relationship similar to marriage
- ~ Individuals who are separated by no more than 2 degrees of:
  - natural; or
  - adoptedconsanguinity or affinity.
- 1.12.2. An individual who is related to a juristic person that he or she controls or whose business it controls.

Provision is made for the Companies Tribunal, the Panel, or a Court, to grant exemption from the provisions for a related party, when independence can be proven.

#### 1.13. **SUBSIDIARY RELATIONSHIP** (Section 3)

A subsidiary relationship exists when one party:

- controls the voting power at General and Annual General Meetings;
- has the power to appoint the majority of the Board.

Subsidiaries in terms of the Act refer only to companies in relation to another juristic person.

#### 1.14. **SOLVENCY AND LIQUIDITY** (Chapter 2, Part D)

A capital maintenance regime based on solvency and liquidity is to be imposed.

The concept of par value shares, although it will continue for existing companies, will no longer apply to new companies, when the new legislation becomes effective.

#### 1.15. **DIRECTORS' DUTIES** (Section 76)

Directors' duties are to include:

- a fiduciary duty; and
- a duty of reasonable care.

To these provisions are added:

- conflicts of interest (Sections 75)
- directors' liability (Section 77)
- indemnities and insurance (Section 78)

### 2. **NOTICES: REFERENCE TO BUSINESS DAYS** (Section 5.3)

Section 5(3) specifies that business days:

- 2.1. exclude the day of the first event
- 2.2. include the day of the second event
- 2.3. exclude public holidays, Saturdays and Sundays which fall between 2.1 and 2.2 above

Section 27(6) states that if, in a particular year, the financial year of a company ends on a Saturday, Sunday or public holiday, that financial year will be regarded to have ended on the next following business day.

### 3. **STATE OWNED COMPANY** (Definitions)

The provisions applicable to "State owned companies", which include the duty to

appoint a Company Secretary, refer to:

- 3.1. a company that is a “State owned enterprise” as defined in the Public Finance Management Act, which does not define this term.
- 3.2. a company that is owned by a Municipality as contemplated in the Local Government Municipal Systems Act.

#### **4. NOTICES: ELECTRONIC TRANSMISSION ACCEPTED**

Section 6(10), as read with Section 61, provides that the transmission of a notice by electronic means is an acceptable form of service.

#### **5. NAME RESERVATION (Section 12)**

Company names are to be reserved for a period of 6 months, with further renewals for a period of 60 business days at a time.

#### **6. INCORPORATION OF COMPANIES (Section 13 )**

Non profit companies will require a minimum of three (3) founding persons, while a profit company requires only one (1) founding person.

#### **7. NON PROFIT COMPANIES [SECTION 16(3)] MAY HAVE NO VOTING MEMBERS: PROCEDURE TO AMEND MEMORANDUM OF INCORPORATION**

A special resolution will continue to be required to amend the Memorandum of Incorporation. This requires agreement by 75% of the votes represented at a meeting.

The interpretation:

- For Profit companies** is that shareholders representing 75% of the shares represented at the meeting shall vote in favour of the resolution;
- For Non-Profit companies who have members** agreement by 75% of the members is required;
- For Non-Profit companies without members**, the Board may amend that company's Memorandum of Incorporation.

#### **8. COMPANY RECORDS**

Section 24(1) provides that company records:

- must be kept for a minimum of 7 years;
- should be in written form, which includes electronic form.

#### **9. FINANCIAL STATEMENTS (Sections 29/30/31)**

Financial Statements:

- must comply with financial reporting standards;
- should fairly present the state of affairs of the business of the company;

- must be prepared within 6 months of the end of the financial year;
- are to be provided to all persons who hold a beneficial interest in the company.

## 10. QUORUM FOR ALL SHAREHOLDER MEETINGS

A quorum of 25% of the votes represented at a General Meeting of members/shareholders is required, provided that not less than three members/shareholders are present. (S64)

This differs materially from the present requirement for an ordinary resolution which, unless the Articles of Association provide for a greater number, is set at 3 members. It seems probable that this may result in a quorum not being present at a large number of General Meetings held after 2010. *[Also, refer to point 19 of this paper]*

## 11. SIMPLIFICATION OF DECISION MAKING: ONE-MAN COMPANY (Section 57)

Section 57 provides that a profit company, which is not a State-owned company:

- will not require notice:
  - when there is one shareholder;
  - when there is one director to perform the duties of the Board.

## 12. PROXIES

Proxies will (S58) remain valid for one year and may concurrently appoint two persons as proxies.

## 13. ROUND ROBIN RESOLUTIONS OF SHAREHOLDERS (Section 60 and Section 65)

13.1. Provision is made for a resolution by shareholders, approved within 20 business days of submission.

13.2. The statutory requirements for an ordinary or special resolution will apply.

13.3. The resolution may include the election of a director.

13.4. A notice must be sent to all shareholders, within ten (10) business days of adopting the resolution, describing the results of voting.

13.5. The Board may decide whether a resolution shall be considered by a General Meeting or by a round robin resolution of shareholders.

13.6. Any two shareholders may propose a resolution for shareholders for consideration:

- at a requisitioned meeting [S61(3)]
- at the next meeting of members/shareholders
- by round robin resolution

13.7. Ordinary resolutions will continue to require approval by more than 50% of the shareholders who voted.

13.8. Special resolutions will continue to require approval by more than 75% of the shareholders who voted. This may be varied by the Memorandum of Incorporation, to require approval by a minimum of 60% of the shareholders.

#### 14. REQUISITIONS FOR A SHAREHOLDER MEETING (Section 61)

- 14.1. The demand for a meeting, which currently requires a requisition by 5 per cent of the voting rights or by 100 members, is increased to 10% of the voting rights. [S61(3)(b)]
- 14.2. A demand for a meeting may be set aside by a Court on the grounds of it being frivolous, the matter already having been decided by shareholders, or of it being vexatious.

#### 15. ANNUAL GENERAL MEETINGS (from Section 61.7)

- 15.1. AGM's shall be held no later than fifteen (15) months after the previous AGM.
- 15.2. The AGM shall consider:
- the Directors' Report
  - The audited Financial Statements
  - The Audit Committee Report**
  - Election of directors
  - Appointment of Auditor
  - Appointment of Audit Committee (**Note:** The appointment of the Audit Committee was not previously a shareholder matter.)
  - Any matters raised by shareholders, with or without advance notice to the company.
- 15.3. Shareholder meetings may be conducted entirely by **electronic communication** [S63(2) and S61(10)]
- 15.4. If no person has been authorised, the Companies Tribunal may issue an administrative order for a shareholder meeting to be convened.
- 15.5. The company shall compensate the shareholder for the cost of applying to the Tribunal or the Court.

#### 16. NOTICES OF GENERAL MEETING (Section 62)

The notice period for General Meetings is now set in business days, as compared to the previous calendar days.  
Accordingly, the following notice period applies:

Public company or non-profit company with voting members	15 days
Private and other companies	10 days

#### 17. SUMMARISED FINANCIAL STATEMENTS

Section 62(3)(d) makes provision for the notice of meeting to present summarised Financial Statements to the shareholders/members, together with an invitation on how to obtain the complete Annual Financial Statements.

#### 18. ELECTRONIC COMMUNICATION: SHAREHOLDERS' MEETINGS (Section 63)

A shareholders' meeting may be conducted by use of electronic communication, provided:

- the notice of meeting informs shareholders of the use of electronic communication at the meeting;
- the shareholder or proxy is responsible for the cost of using electronic communication to participate in the meeting.

## 19. SHAREHOLDERS' MEETINGS: QUORUM AND ADJOURNMENT (Section 64)

- 19.1. Should a quorum of 25% of the voting rights, which quorum applies to ordinary and special resolutions, not be present at a shareholders' meeting, after waiting for one hour or such period as set by the Memorandum of Incorporation, the meeting shall be postponed without further notice, for one week.
- 19.2. Further notice is not required, unless the adjournment was on the basis of "until further notice". The new legislation, unlike the old, makes no provision for a press notice of adjournment.
- 19.3. The new legislation does not make provision for the attendees of the adjourned meeting to effectively be deemed to be a quorum, by being authorised to pass a special resolution, as provided in section 199(3) of the Companies Act, 1973. This could delay the passing of resolutions.

## 20. THE NEED FOR SPECIAL RESOLUTIONS [Section 65(11), Sections 112 – 116]

20.1. Special resolutions are required:

- to amend the Memorandum of Incorporation;
- to approve the voluntary winding-up;
- for disposal of all, or the greater part, of assets or undertakings [New provision];
- for an amalgamation/merger;
- for a Scheme of Arrangement;
- for **directors' remuneration** [S66(9)]

20.2. The requirement for a special resolution before disposing of all, or the greater part, of a company's assets or undertakings, has progressed from the requirement for an ordinary resolution, contained in the 1973 Companies Act, to a requirement for a special resolution, as is the case in terms of the Corporate Laws Amendment Act, 2007.

## 21. BOARD DIRECTORS AND PRESCRIBED OFFICERS (Sections 66 to 70)

21.1. A private company or personal liability company will require at least one director.

21.2. Public companies and Non-profit companies require a minimum of 3 directors.

21.3. The legislation refers to an "ex officio" or executive director, who has all the powers and duties of any other director. An ex officio director will **cease to be a director upon ceasing to hold office** [S70(1)(b)].

21.4. The Board may discharge a director for various reasons, including negligence or dereliction of duty [S70(1)(b)(vi) and S71(3)]

21.5. A profit company must allow for **shareholders to elect a minimum of 50% of the directors** and 50% of the alternate directors. [Note: As the majority of directors should be non-executive directors, it would suffice for only non-executive directors to be elected.]

- 21.6. **Directors' remuneration** shall be **approved by a special resolution**, passed by shareholders [S66(9)].
- 21.7. The decisions of the Board shall be valid, even if the number of directors is below the minimum required by the new legislation or the Memorandum of Incorporation.
- 21.8. The Board is obliged, within 40 business days, to convene a shareholders' meeting to elect directors (S67), if the number of directors falls below the minimum.
- 21.9. The provision in the Companies Act 1973 for a shareholders' meeting, after passing a resolution to simultaneously elect all directors by means of a single resolution, no longer applies. Each director shall be appointed by a separate resolution.
- 21.10. The new Companies Act requires:
- separate voting for each candidate director;
  - for vacancies only to be filled if more than 50% of the shareholders who voted, supported the candidate director [S68(2)].
- 21.11. Provision is made for the appointment of a director on a temporary basis [S68(3)]
- 21.12. The **disqualification that** prevents a person from being a director because of dishonesty or because of conviction, without the option of a fine, for theft, fraud, or forgery, automatically **falls away after 5 years** [S69(9)], unless a Court rules otherwise.
- 21.13. A disqualified person **may be a director of a private company** when all the shares are owned by the disqualified person alone or with related persons, the latter having consented to the appointment.

## 22. REMOVAL OF DIRECTORS (Section 71)

- 22.1. A director may be removed by an ordinary resolution at a shareholders' meeting.
- 22.2. The director must be given the same notice of the resolution as shareholders.
- 22.3. The director should be allowed to make representations to the shareholders' meeting, either in person or through a representative.
- 22.4. The Board may remove a director whom it has determined is ineligible, disqualified, incapacitated, negligent or guilty of dereliction of duty.

## 23. BOARD COMMITTEES (Section 72)

Board Committees may appoint non-directors [S72(2)] to a Committee. Such persons shall not have a vote. Please note that the Audit Committee is not deemed to be a Board Committee.

**Note:** It is clear from sections 69, 72, 75 and 78 that the non-voting person in question does not have a vote (S72). The definition of "director", in section 69(1), 75(1), 77 and 78(1), however, includes a member of a Committee of the Board, or of the Audit Committee for purposes of those sections which deal with qualification/eligibility, "director's personal financial interests", "liability of directors and prescribed officers" and "indemnification and directors' insurance".

## 24. COMPANIES WITH ONE DIRECTOR

Companies with one director are, in terms of S57(3)(b), exempt from the provisions of various clauses, including, but not restricted to the following:

- 24.1. S73: Board meeting requirements
- 24.2. S74: Directors acting other than at a meeting

## 25. BOARD MEETINGS (Section 73)

- 25.1. A Board meeting is obligatory if called for by:
  - In the case of a Board with 12, or in excess of 12, directors: 25% of the directors
  - otherwise: 2 directors
- 25.2. Board meetings may be held with certain or all the directors using electronic communication.
- 25.3. If there is a tie in voting and the Chairperson has not previously voted, then the Chairperson may cast a deciding vote. In all other instances, the motion is not carried.
- 25.4. Minutes of meetings are required.
- 25.5. Resolutions:
  - should be dated and numbered sequentially;
  - are effective, with immediate effect

## 26. ROUND ROBIN RESOLUTIONS: DIRECTOR ACTING OTHER THAN AT A MEETING (Section 74)

Round robin resolutions will require written consent by a **majority** of directors.

[**Note:** The 1973 Act referred to **all** directors.]

## 27. DIRECTORS' PERSONAL FINANCIAL INTEREST (Section 75)

- 27.1. When the **only director** of a company does not hold all the securities, he/she may only enter into a contract in which he/she or a related person has a **personal financial interest**, after obtaining an ordinary **resolution of shareholders**.
- 27.2. A director must disclose their financial interests, to be used until changed or withdrawn. [**Note:** The 1973 Act provides that a general declaration of interest will only apply until the end of the current financial year.]
- 27.3. A director is required to disclose their personal financial interest and/or that of an associated person:
  - before it is considered by a meeting of the Board [S75(5)], and recuse themselves by leaving the meeting, without taking part in the discussion. [**Note:** The 1973 Act does not require the director to recuse him/herself.]

## 28. STANDARDS OF DIRECTOR'S CONDUCT (Section 76)

- 28.1. Directors are required:

- not to use their position or information obtained:
  - for their own interest;
  - for the advantage of another person
  - to knowingly cause harm to the company or subsidiary of the company.

28.2. Directors are required to act:

- in good faith;
- in the best interests of the company;
- with a reasonable degree of care, skill and diligence

28.3. Directors are entitled to rely on information provided by:

- employees of the company
- legal counsel
- accountants
- other professional persons
- a Committee of the Board

## **29. LIABILITY OF DIRECTORS AND PRESCRIBED OFFICERS (Section 77)**

29.1. A director, prescribed officer and a member of a Board Committee is liable:

- for a breach of a fiduciary duty;
- for losses, damages or cost resulting from:
  - acting without the necessary authority;
  - agreeing to the company carrying on business in a situation in which it is insolvent, reckless, grossly negligent or acting fraudulently;
- for signing or consenting to the publication of Annual Financial Statements or a Prospectus, which contains an untrue statement;
- for knowingly consenting to the issue of shares, which had not been authorised;
- for granting unauthorised options;
- for agreeing to the granting of financial assistance to directors or other parties, when not in accordance with requirements;  for knowingly failing to vote against a share purchase that did not accord with the legislative requirements.

29.2. A director will only be liable for failing to vote against a distribution if, immediately after so voting, the company failed to satisfy the solvency and liquidity tests and this was reasonably predictable.

29.3. Liability is joint and several with other parties found liable for the act.

29.4. Action to recover loss, damages or costs may not commence more than three (3) years after the act or omission [S77(7)]

29.5. An application may be submitted to a Court for relief.

## **30. INDEMNIFICATION AND DIRECTORS' INSURANCE (Section 78)**

30.1. A company may not indemnify a director against liability.

30.2. The company may, if authorised in its Memorandum of Incorporation:

- make an advance to a director for defence costs;
- pay all the expenses of a director if the allegations are abandoned or discharged.

30.3. A company may **purchase insurance** (S78) to protect:

- a director against liability or expenses;
- the company** against the expenditure incurred in:
  - advancing funds to a director;
  - reimbursing or indemnifying a director against expenses.

### 31. WINDING-UP OF SOLVENT COMPANIES AND DEREGISTERING OF COMPANIES

Sections 79 to 83 set out the procedures for winding-up solvent companies and for the deregistering of companies.

### 32. APPOINTMENT OF COMPANY SECRETARY

As with the 1973 Act, the new legislation requires all public and state-owned companies to appoint a Company Secretary [S84(4)(a), 86 and 87] and to register the Company Secretary (S85). The duties of the Company secretary in S88 remain unchanged.

### 33. APPOINTMENT OF AUDITOR

S84(4)(b) requires public and state-owned companies to appoint an auditor and to register the auditor (S85).

### 34. APPOINTMENT OF AUDIT COMMITTEE

S84(4)(c) requires the shareholders of public and state-owned companies to appoint an Audit Committee.

### 35. AUDITOR

Sections 90 to 93 deal with the appointment of an Auditor by public and state-owned companies.

Upon its incorporation, and each year at its annual general meeting, a public company or state-owned company must appoint an auditor.

To be appointed as an auditor of a company, whether as required by subsection (1) or as contemplated in section 34 (2), a person or firm must be acceptable to the company's **audit committee** as being independent of the company, having regard to the matters enumerated in section 94 (8), in the case of a company that has appointed an audit committee, whether as required by section 94, or voluntarily as contemplated in section 34 (2).

A retiring auditor may be automatically re-appointed at an annual general meeting without any resolution being passed, unless an **audit committee** appointed by the shareholders of a company in terms of this Act objects to the reappointment;

Auditor Vacancy: Before making an appointment in terms of subsection (2) –

(a) the board must propose to the company's audit committee, within 15 business days after the vacancy occurs, the name of at least 1 registered auditor to be considered for appointment as the new auditor;

(b) may proceed to make an appointment of a person proposed in terms of paragraph (a) if, within 5 business days after delivering the proposal, the audit committee does not give notice in writing to the board rejecting the proposed auditor.

Other Services:

An auditor appointed by a company may not perform any services for that company that would place the auditor in a conflict of interest as prescribed or determined by the Independent Regulatory Board for Auditors in terms of section 44 (6) of the Auditing Profession Act, 2005 (Act No. 26 of 2005); or as may be determined by the company's audit committee in terms of section 94 (7)(d).

The review of the independence of the auditor remains a matter to be dealt with by the Audit Committee.

Section 92 continues to apply the principle of "designated auditor", not being permitted to serve a company for more than five (5) years.

### 36. AUDIT COMMITTEES (Section 94)

36.1. Each Annual General Meeting of public companies and state-owned companies must appoint **at least three** directors to the Audit Committee, unless the company is a subsidiary of another company that has an Audit Committee.

36.2. Members of the Audit Committee must be **non-executive** directors and may **not be**, or be **related to**, a prescribed officer, a material supplier or customer.

36.3. Any vacancy must be filled in 40 business days.

36.4. The duties of the Audit Committee [S94(7)] now include the need to prepare a **report for the Annual Financial Statements** on:

35.4.1. How the Audit Committee carries out its functions;

35.4.2. Confirming whether or not the auditor is independent;

35.4.3. Commenting on:

- The financial statements
- Accounting practices
- Internal financial control

36.5. The other duties, which remain unchanged, deal with:

- Nominating the **auditor**;
- Verifying the **independence** of any proposed appointee as auditor, before the appointment becomes final;
- **Audit fees**;
- Nature and extent of **non-audit services**;
- Pre-approval of **contracts** for non-audit services;
- Dealing with concerns or complaints relating to:
  - accounting policies
  - internal audit
  - the audit or content of Annual Financial Statements
  - internal financial controls
- The effectiveness of **risk management**, controls and governance processes.

### 37. PUBLIC OFFERINGS OF COMPANY SECURITIES (Chapter 4)

37.1. The provisions of section 144A of the 1973 Act, which require a "compliance officer" for employee share schemes, are reflected in section 97 of the new legislation.

37.2. The new legislation makes provision for requirements concerning the prospectus and secondary offers to the public (S95 – 111).

### **38. FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS (Chapter 5)**

This section of the new legislation contains provisions grouped as:

<b>Part A</b>	Approval of certain fundamental transactions.
<b>Part B</b>	Authority of Panel and Takeover regulations.
<b>Part C</b>	Regulation of affected transactions and offers.

### **39. BUSINESS RESCUE AND COMPROMISE WITH CREDITORS**

Chapter 6, which starts from section 128, contains provisions for business rescue.

### **40. REMEDIES AND ENFORCEMENT: ALTERNATIVE PROCEDURES FOR ADDRESSING COMPLAINTS OR SECURING RIGHTS (Section 156)**

An alleged contravention of the provisions of the Act may be addressed:

- By alternative dispute resolution
- By applying to the Companies Tribunal
- Via the High Court
- By submitting a complaint to:
  - the Takeover Regulation Panel
  - the Commission of Companies and Intellectual Property

Alternative resolution provisions are set out in S166.

### **41. DISPUTES: COMPANY NAMES (Section 160)**

The Companies Tribunal shall make a determination, following the receipt of an application from an interested party relating to the reservation or registration of company names.

### **42. PROTECTION OF SECURITIES HOLDER (Section 161)**

A Court may consider an application from the holder of securities to determine rights, protect rights or rectify harm done by an infringement of the applicant's rights.

### **43. DECLARING A DIRECTOR TO BE DELINQUENT OR UNDER PROBATION (Section 162)**

A Court may consider an application to declare a director to be delinquent or under probation.

### **44. RELIEF FROM OPPRESSIVE OR PREJUDICIAL CONDUCT (Section 163)**

A shareholder or director may apply to Court for relief from oppressive or prejudicial conduct.

### **45. DISSENTING SHAREHOLDERS: APPRAISAL RIGHTS (Section 164)**

A minority shareholder may object in writing before a resolution is passed that may adversely affect his or her rights.

The company shall then, within 10 days of the adoption of the resolution, send a notice to the objectors, confirming that the resolution has been passed.

The shareholder may then demand a fair value for their shares.

The procedures for claiming a fair value form several pages of the Act.

**46. DERIVATIVE ACT (Section 165)**

The Act substitutes new rights in place of the rights, contained in the 1973 Companies Act, for a person to take legal action on behalf of the company.

**47. COMPLAINTS TO THE TAKEOVER REGULATION PANEL OR THE COMMISSION (Section 168)**

Sections 168 to 170 provide for the filing of complaints relevant to the Takeover Regulation Panel or the Commission.

An investigation shall then be undertaken.

**48. COMPLIANCE NOTICES**

Section 171 provides the Commission and the Executive Director of the Takeover Regulation Panel with the right to issue compliance notices.

Section 172 provides the procedure to object to a compliance notice.

**49. ADMINISTRATIVE FINES (S175)**

A Court may impose a fine for not observing a compliance notice, the greater of up to 10% of the respondent's turnover or R1 000 000, during the time period in which there was failure to observe the terms of a compliance notice.

**50. SUMMONSES AND PROCEDURE FOR "ENTER AND SEARCH"**

Sections 176 to 179 provide for powers to support investigations and inspections.

**51. PROCEDURES FOR ADJUDICATION BY COMPANIES TRIBUNAL**

Sections 180 to 184 provide procedures for adjudications by the Companies Tribunal.

**52. ESTABLISHMENT OF COMPANIES AND INTELLECTUAL PROPERTY COMMISSION**

Sections 185 to 192 relate to the establishment of the Commission.

**53. THE COMPANIES TRIBUNAL**

Detailed provisions for the appointment and functions of the Companies Tribunal are contained in sections 193 to 195.

**54. TAKEOVER REGULATION PANEL**

Sections 196 to 202 provide for the operations of the Takeover Regulation Panel.

## **55. ESTABLISHMENT OF FINANCIAL REPORTING STANDARDS COUNCIL**

Sections 203 and 204 set out the requirements of the Financial Reporting Standards Council.

## **56. OTHER PROVISIONS**

56.1. Internal matters pertaining to the Companies Tribunal, the Panel and the Council (S205 to 212)

56.2. Offences and penalties (S213 to 225)

## **57. REGULATIONS**

The Minister **must** make the following regulations:

- establish a council to be known as the Financial Reporting Standards Council (FRSC)
- select and appoint candidates for membership of the FRSC
- establish the Takeover Regulations
- provide for the transitional status and conversion of nominal or par value shares, treasury shares and capital accounts to no par value shares

The Minister **may** make regulations prescribing the following:

- financial reporting standards
- requirements for different companies prescribing the private companies that have to have their AFS audited
- manner, form procedures for the conduct of an independent review
- the professional qualifications of the people who can conduct the independent review
- categories of companies that has to have a social and ethics committee
- minimum qualification requirements for members of audit committees
- designating one person or association to regulate the practice of persons as Business Rescue Practitioners
- Business Rescue Practitioner qualifications, remuneration and procedures to be followed
- designate any organ of state or other entity to deal with conciliation, mediation and arbitration
- require the FRSC to be a member of a relevant international accounting standards setting organisation.

## **58. SCHEDULES**

58.1. Schedule 1: Provisions concerning non-profit companies

58.2. Schedule 2: Conversion of Close Corporations to Companies

58.3. Schedule 3: Amendment of laws

58.4. Schedule 4: Legislation to be enforced by the Commission

58.5. Schedule 5: Transitional Arrangements